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No. 11.

OBSERVATIONS

ON THE

PETITIONS from various Merchants of Rhode-Island,

TO THE

Congress of the United States,

PRAYING TO BE RELIEVED FROM THE *PENALTIES* OF CERTAIN EXPORTATION BONDS.

WITH AN

APPENDIX.

Printed at NEWPORT, (R. I.)—1803.

Mr Johnston

This pamphlet was distributed among the Members of Congress by General Stanton Representative from Rhode Island, & and the enquiry of the Committee of Commerce and Manufactures, into the merits of the petition therein referred to.— The petitions were read & referred on the 1st November 1803.

THE duties of a Member of Congreſs are ſo various and important, that an equal and impartial attention to all can hardly be expected. Some of theſe duties are but of inferior obligation. Public concerns neceſſarily engroſs his peculiar regard. Applications from individuals, for the redreſs of private grievances, have but a ſecondary claim upon his time and diligence. Theſe private applications, however, frequently involve the moſt important principles of public policy; and, indeed, always rightfully challenge a direct and particular attention; as the reſult is always certainly intereſting to the individual, and in many inſtances, his ſafety or his ruin may depend upon the deciſion. The progreſs of proceedings, upon petitions to Congreſs for redreſs of grievances, partake, in ſome degree, of the character of judicial enquiries; and it is equally the right and duty of the parties, in the one caſe as in the other, to ſupply information, to furniſh evidence, to adduce arguments, and, generally, to illuſtrate the fairneſs and propriety of their demands. It cannot be improper to facilitate, by theſe means, the acquiſition of that knowledge of the queſtion, without which no one can be competent to its deciſion. If proper in ordinary caſes, it is peculiarly ſo in thoſe which form the topic of the preſent conſiderations—as on the part of the Petitioners it is confidently alledged, that a mere knowledge of the facts on which their applications are founded will clearly demonſtrate their right to relief and indemnity.

The Petitions referred to, are thoſe of *William Gardner*, of Newport, Rhode-Iſland, Merchant; *Conſtant Taber*, Eſq. of the ſame place; *Charles D'Wolfe*, of Briſtol, State of Rhode-Iſland, Merchant; and likewiſe the joint petition of *Simon Davis*, of Newport, Merchant, and *Samuel Martin*, of Warren, in the State of Rhode-Iſland, Merchant. Theſe caſes in their leading facts are alike, and muſt all be decided by the ſame principles.

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The general queſtion is ſimply this —Will the Government of the United States exact the penalties of an exportation bond, when the articles mentioned in that bond have bona fide been exported to, been landed, ſold, and conſumed, in a foreign country; and when evidence of this, perfectly ſatisfactory & convincing, has within the period ſpecified by Law been produced?

In none of theſe caſes, is it doubted but that an exportation took place, nor is a clandeſtine re-importation of the articles charged or ſuſpected by any officer of Government. No fraud has been imputed againſt the petitioners, no ſuggeſtion of any intention to defraud the revenue has been thrown out againſt them, and no idea is entertained that the revenue has in the ſmalleſt inſtance to the ſmalleſt amount been injured.

The objections to the immediate diſcharge of theſe bonds have ariſen only on account of what may be termed technical difficulties. The proof required for their diſcharge was in certain merely formal points defective. The parties from the neceſſity of the caſe, the nature of the trade, and unavoidable accident, were unable to comply with the requiſites of the ſtatute in ſome of its minute and unimportant particulars. How minute and unimportant theſe particulars are will be ſeen by a compariſon of the evidence furniſhed with that which the ſtatute requires.

It is apprehended that a prejudice may be conceived againſt theſe applications becauſe they ſeek relief from caſes ariſing under the revenue laws. It is contended however, that theſe are applications to the mercy and equity of the Government, authorized by the ſpirit and intention of thoſe laws.

It has been ſaid, that theſe laws are to be conſtrued and applied with great exactneſs, that they are framed for the ſecurity of great national intereſts, and the effect of ſuch laws founded on great purpoſes of public policy muſt not be weakened by minute tenderneſs to particular hardſhips. At the ſame time it is not to be ſaid (ſays the ſame authority) that they are not ſubject to all conſiderations of rational equity. Caſes of unavoidable accident, invincible neceſſity, or the like, where the party could not act otherwiſe than he did, or has acted at leaſt for the beſt, muſt be conſidered in, this ſyſtem of laws, juſt as in other ſyſtems. Laws that would not admit an equitable conſtruction to be applied to the unavoidable misfortunes or neceſſities of men—or to the exerciſe of a fair diſcretion under difficulties, could not be laws framed for human ſociety.§ It

§ See the opinion of Sir Wm. Scot, caſe of the Betſy, Cathcart, Rob. Rep. page 185.

It is by these principles that it is hoped the petitions will be tested. If the cases of the petitioners, after a *particular* examination, still present, as they do on their general appearance, a favorable aspect; if no symptom of fraud, if no attempt to impose, be discovered, then the petitioners hope and presume they are not to be sacrificed, as the victims of a *general* policy, merely because that policy is anxious to prevent the possibilities of fraud.

Some attention will now be bestowed on the facts disclosed by the petitions.

From the petition of William Gardner it appears, that he became bound as *surety* in a bond to the United States, in which John Stanton of Newport, mariner, was *principal*, in a penalty of fourteen hundred fifty eight Dollars and thirty five Cents, for the exportation abroad, viz. to Africa, of one hundred and one hogsheads and twenty six tierces, containing eleven thousand two hundred eighteen gallons of rum. To which bond was annexed a Condition, "that the said Stanton should within two years from the date produce to the Collector, the certificates required by law, that the said enumerated merchandize had been exported to, and landed at the said Africa, or at some other port or place without the limits of the United States; or if neither the whole nor any part of the said goods, &c. should be landed within the limits of the said United States until due entry thereof should have been first made and the duties thereon paid or secured to be paid according to law, then the obligation to be void," &c.

The Petition further alledges, that the merchandize described had been with *good faith* exported to Cape Coast in Africa, that it there was sold and remained. To support this statement, the Petitioners produce a Document (see Appendix No. 1.) containing the oath of John Stanton, master, and Thomas White, mate, of the Sloop Juliet, sworn to before I. Gordon, Governor of Cape Coast Castle, and attested by H. R. Herbert, Secretary, that there had been landed from on board the said Sloop, and left in Africa, the very quantity of merchandize mentioned in the bond.—Which document likewise contains the affidavit of said Stanton and White, sworn to before Christopher Ellery, Esq. Justice of the Peace at Newport, confirmatory of the truth of the above,—and further stating that there were not residing at said Cape Coast Castle, any Consular or other public Agent for the United States, or American merchants, or Foreign merchants other than those who have signed the Certificate or Document aforesaid,—Of the "truth and validity"

validity" of this proof, no ſuſpicion whatever was entertained by the Collector of the Cuſtoms at Newport, nor is any ſuch ſuggeſted in his ſtatement of the circumſtances attending the tranſaction, in his letter to the Comptroller. This will be ſeen by an inſpection of that correſpondence, and is likewiſe ſhewn by the Affidavit of John Bours, jun. of Newport, merchant. (ſee Appendix No. 2.) This Document or Certificate, it is admitted, is not in all points conformable to that of which the Statute has given the form. But there is no ſubſtantial variation. The miſtake it is conceived is this :— Stanton, being as well Captain as Conſignee, by the 81ſt Sect. of the general Collection Law, ought to have procured certificates from the perſons to whom the merchandize was ſold or delivered. And this would have been done, had the nature of the Trade allowed it.—But every one, who has the leaſt knowledge of the Trade to the coaſt of Africa, muſt know, that ſuch is the ignorance and barbarity of the natives of the country, their diſperſed ſituation, the ſmall quantity of the articles ſold and to ſo many individuals, that it would be altogether an impoſſible attempt to collect ſuch certificates. It would be altogether a fruitleſs undertaking, to collect from every negro, to whom a gallon of rum had been ſold, and who was totally ignorant of letters a certificate of the ſale and delivery. Being ignorant, a negro is ſuſpicious, and will not affix his mark to any paper, the meaning of which he could hardly comprehend.—It is, beſides, the courſe of things, for the Governors in the Engliſh ſettlements, to take the oaths of the captain and mate to aſcertain the fact of exportation and landing. Except the immediate officers of the ſettlement, there are but few reſident Europeans; and at Cape Coaſt Caſtle almoſt every thing, in relation to landing a cargo, muſt neceſſarily paſs under their inſpection. It is preſumable that the Governor muſt be a reſpectable and intelligent individual. Certainly the oath of the Captain and Mate, taken before ſuch a man in the country where the fact took place, is better evidence than the *marks* of negroes and barbarians, careleſsly given, or promiſcuouſly procured. The Governor and Secretary themſelves could give no oath as to this matter, for they are the only perſons by whom an oath could there be adminiſtered; and as it is proved by the affidavit of Martin Benſon, Eſq. (ſee Appendix No. 3.) it is againſt their uſage to give ſuch certificates as of courſe from themſelves. It is their manner of buſineſs to give certificates like the one produced; and the Secretaries of the Caſtles derive an emolument from filling them up—and there is no ſmall difficulty in procuring any other certificates than what they are willing to give—they have in various inſtances refuſed it. Their anſwer is, ſuch certificates ſatisfy

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our goverment, where a fyſtem of Cuſtoms and Drawbacks like yours prevails, and why ſhould they not ſatisfy yours? They give the form preſcribed by their own Laws, and with an obſtinate adherence to official forms will give no other.

Does not then this proof fully comport with the intention, and even expreſs letter, of the fourth paragraph of the 81ſt Sect. of the general Collection Law which ſays, "That in caſe of loſs by ſea or by capture, or other unavoidable accident, or *when from the nature of the Trade* the proofs and certificates required are not and cannot be produced, the exporters are allowed to produce ſuch other proofs as they may have or the nature of the Trade will admit." Is not this a caſe of unavoidable accident, of imperious neceſſity? Is not the proof ſubſtantially what is required by the Law, and was not the ſituation of the Petitioner contemplated in the law, and the otherwiſe ſevere requiſites of the Statutes as to him relaxed? In caſes of informal certificates from the North Weſt Coaſt of America, no difficulty is made; and what is there to make a difference between this trade & that to Africa? Are they not in their nature equally irregular, & is it poſſible in either caſe to procure from barbarians correct and legal Certificates? But it further appears that, when after the arrival of Capt. Stanton from Africa, ſome objection on account of the form of the Document was apprehended, that he procured from the Cuſtom Houſe printed forms of the proper certificates, which *were filled up by a Clerk in the Cuſtom Houſe*—which certificates were ſent to Africa and returned within the time required by law. But in this ſupererogatory labour, Capt. Stanton was unfortunate.—For the only defect in the other certificate, viz. not being certified by the foreign Vendees, was not pointed out to him at the Cuſtom Houſe, or could not be remedied upon his ſecond application in Africa. Indeed the form of the certificate furniſhed and filled up at the Cuſtom Houſe, would neceſſarily deceive Capt. Stanton or thoſe whom he employed. It is altogether unuſual not to have foreign Conſignees on *foreign* voyages—and the blanks furniſhed at the Cuſtom Houſe are *Conſignees* Certificates and to be ſigned by them—The certificates for foreign *Vendees* are not furniſhed. Stanton, a ſeafaring man, totally unverſed in the nicities of Revenue Laws, reading the form, knowing himſelf to be Conſignee, ſeeing the blanks of that form filled up and his name inſerted as Conſignee in the known hand writing of the Clerk of the Cuſtom-Houſe, ignorant as moſt merchants, and even many lawyers are, that in caſe the captain be Conſignee the foreign Vendee muſt

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certify, thought he had done his duty and all that was required of him if that certificate was signed, and supported by confirmatory proof, which was done.—He expected, as had been told him, that his bond would then be cancelled. But it appears that this has not been done, and that Mr. Steele, the former Comptroller of the Treasury, has placed all the Cases on African exportation Bonds on one footing—not because he doubted the fairness and validity of the proof presented, but because he *suspected* that the vessels *might* have been employed in a Traffic prohibited by the Laws of the United States. This objection will hereafter be considered. To conclude the consideration of the facts in William Gardner's Case, it appears that the Revenue has not been injured, that no fraud has been committed or contemplated, that there has been no want of diligence to procure the certificates required by law, that as to the proofs adduced there is no doubt of their truth and validity. It presents then a fair claim to the equitable interposition of Congress, who will relieve unrestrained in their pursuit of justice by any technical or inflexible rule of law. Their only inquiry will be, has any fraud been committed—and upon that enquiry being answered in the negative, relief will of course be obtained.

The petition of Constant Taber presents the following facts, viz. That he, together with Willam Gardner, on the fifteenth day of October, 1799, became bound as security to the United States, in the sum of three thousand five hundred forty six Dollars and sixty six Cents, for the exportation abroad, of forty eight hogsheads and twelve tierces, containing five thousand three hundred and twenty gallons and one half gallon of domestic distilled Spirits. To which bond was annexed a condition in conformity to the law of March, 1797, in the words following, viz: "If therefore the said distilled spirits, the dangers of the seas and enemies excepted, shall be really and truly exported to, and landed in some port or place without the limits of the United States; and that the said spirits shall not be unshipped, from on board the said Schooner, within the said limits, or any ports or harbours of the United States; and that the said spirits shall not be relanded in any port of the same (shipwreck or other unavoidable accident excepted) then the above obligation to be null and void, otherwise to remain," &c. †

It further states, that these spirits were faithfully exported in the Schoon. Betsey, Daniel Whitney Master, in conformity to the condition; and landed,

† That the Condition of this bond, at the time it was taken, viz. the 15th October, 1799, was *illegal*, will be shewn in the sequel.

ed, ſold and conſumed at Bakea, on the coaſt of Africa. That of this performance of the condition, full and ſatisfactory, though *informal* evidence was within the time required by law produced. This evidence conſiſts of a certificate of two Merchants of Bakea, P. Amel, and Benj. Curtis, as to the landing there of forty ſix hogſheads and twelve tierces, containing five thouſand and eighty four gallons and one half gallon, and likewiſe of another certificate of the ſame Benj. Curtis, and Henry Lancaſter, of the landing of two hogſheads, containing two hundred and thirty ſix gallons; which two quantities compriſe the whole mentioned in the bond. Which certificates are completely confirmed by the affidavit of Hugh Delace, ſecond Mate of the ſaid Schooner Betſey, ſworn to before William Stevenſon, Notary Public at Boſton; which affidavit likewiſe ſhews that Daniel Whitney, the Captain, died on the coaſt of Africa, that the ſaid Schooner proceeded to Surinam, *where ſhe was ſold*, and that the chief Mate ſailed from thence to the Cape de Verd Iſlands.

The bond being taken under the law of March, 1791; its condition being in the expreſs words preſcribed by that Statute; and the condition being the *Contract* which the obligors had made with the Government; that to which they muſt look, for their rule of conduct and ſtandard of performance; it is reaſonable and equitable that the condition ſhould be deemed to be performed, and the bond be conſequently diſcharged, if the proof produced conforms to the requiſites of that Statute.

To theſe requiſites, as ſtated in the 57th Section, the proof does ſubſtantially conform. There are produced the certificates of two reputable merchants, teſtifying the delivery of the ſpirits at the place of their reſidence. The confirmatory affidavit ſtates the death of the *Captain*, which by the unuſually, and one may ſay abſurdly cautious proviſo of the ſame Section, makes his oath in that caſe unneceſſary. It ſtates the abſence of the chief Mate in a foreign port, which made it impoſſible to procure his affidavit. This proof is defective but in one point. It ought to have been part of the confirmatory oath, that there were not upon diligent enquiry to be found two merchants of the United States at Bakea in Africa.—Will the United States, for this immaterial omiſſion, enforce penalties to the ruin of innocent individuals? Would a thouſand affidavits make more certain, what notoriety & common fame aſcertain, that in Bakea there are no merchants of the United States? Can any doubt be entertained as to the fact?

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But the reaſon of the omiſſion is very obvious, and to remove every ſuſpicion and obviate every objection, this ſhall be explained. Altho' it was the duty of the Collector of the Cuſtoms to take this bond according to the form preſcibed by the general collection law of 1799; yet owing, perhaps, to inattention—the copy of the law not having reached him; or to ſome other, no matter what cauſe—the bond was taken according to the form of the law of 1791, and the *blank certificates, always furniſhed from the Cuſtom-Houſe*, were ſuch as that law *required*. On the return of the officers of the Betſey, the general collection law of 1799, before in force, was then alſo in *actual uſe*; and the forms of confirmatory oaths, adminiſtered by Magiſtrates and Public Notaries, were in conformity to that law. Stevenſon, the Notary Public, uſed the form which the operative Statute of the United States required; and the only error in the proof adduced in the preſent inſtance, is chargeable to the primary error of the Cuſtom-Houſe: Surely for that error the petitioners are not accountable. It would have been but a matter of courſe, for Delace, the deponent, to have ſworn to what all the world knew, that at Bakea in Africa, there are no merchants of the United States, but that, by the law then actually in force, was not neceſſary, and therefore omitted. It is obvious that all the obſervations as to the truth and validity of the proofs adduced, made in Gardner's caſe, apply to this. No fraud has taken place—none is ſuſpected. The revenue has not been injured. It is the fault of the Cuſtom-Houſe officers; it is the misfortune of the parties, that their proof does not in all points minutely conform to the modal requiſites of the Statute; and from invincible neceſſity, and inevitable accident, it could not be procured.

It is unneceſſary to mention in detail the facts diſcloſed in the petition of Simon Davis and Samuel Martin. They preſent a caſe ſimilar in circumſtances, and of an aſpect as favorable, as either of thoſe above recited. In all, the fact of exportation is undoubted, a matter admitted, of great notoriety, of ſuch internal force of conviction, and ſo corroborated by circumſtances, that even the proſecuting officers of Government do not withhold their unheſitating belief. Theſe three caſes, however, offer one prominent feature of difference from thoſe which follow; a difference which affects theſe caſes with a *peculiar* equity, and which in the minds of many may entitle them to extraordinary attention, to more prompt and facilitated relief. Meſſrs. Taber, Gardner, Davis, and Martin are *ſecurities*, not *principals* in theſe bonds. They had no intereſt or concern in the voyage; and if according to an unfounded and illegal ſuſpicion theſe were illicit voyages, they in

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no degree partake of the criminality. They signed the bonds upon a casual request, as a matter of course, at the Custom-House, not in the least apprehensive that a suspicion as to misconduct in others, would be perverted to injustice and oppression against them.

The principals in these cases, as appears from the affidavits No. 6. have since most of them died insolvent, or if living, are Bankrupts, or absentees from the United States, beyond the reach and knowledge of the petitioners. If relief be not obtained, this injustice will inevitably happen, that those against whom *no fraud is, or can be imputed, who could have had no concern* in the transactions *suspected* to have been illegal, will have money causlesly and cruelly taken from their pockets. In other words, the *innocent* will suffer. The merchant will have occasion to regret that integrity of conduct, that fairness of dealing, that an honest attention to the claims of Government are unavailing, and that nothing can save him from penalties, but a knowledge at once comprehensive & exact of a complicated system of law, and an attention to forms too *minute* and *scrupulous* for commercial concerns and human necessities. The confiding and unsuspecting friends, ‡ who, in the ordinary course of business, did a favor hardly ever to be refused; the widow and the orphan, who can with difficulty be taught why they must be stripped of *their all* for the mere purpose of supporting a rigid inflexible rule of law (if it be one)—the creditor who finds that the United States, by their exclusive priority, engross all the property of his debtor, will be injured and oppressed. To a tribunal obliged to regulate its decisions by the maxims of the common law, these considerations ought not to be urged. But to a Court of EQUITY, one may without impropriety urge the situation of a *mere security*, and in that Court every fair construction in his favor, that could be, would be adopted. With more propriety then can we urge these considerations, to a Tribunal, that adjudicates upon the broad maxims of a liberal and enlightened policy, upon the genuine principles of distributive justice, unimpeded by vain formalities and disgraceful subtleties. Without other merits, these suggestions ought not to influence decision, but surely when these circumstances surround a case of strict justice and real merit, they may be mentioned to stimulate attention, to incline doubts, and to reconcile opinions.

The most important of these cases as to amount, is that of Charles D'Wolfe, of Bristol. His petition states that he was bound as principal to

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‡ See the Affidavit of Messrs. Taber, Davis, and Gardner.

the United States, in a bond, dated the 5th of June 1799, in a penalty of four thousand one hundred & twenty-eight Dollars. The condition of the bond being, for the due exportation abroad of fifty eight hogsheads, one tierce and eighteen barrels of domestic distilled spirits, according to the law of March 3d, 1791. It further states that he was likewise responsible to the United States as principal in another bond, dated the 30th August, 1799, for the penalty of thirteen thousand seven hundred and thirty one Dollars and sixty seven cents, with a condition similar to that of the bond abovementioned :—That these conditions have been fully and faithfully performed; and that of this performance, manifold proofs have been produced within the time limited by law. These proofs as to the first bond, consist of a certificate of Charles Collins, jun. of the town of Warren, Captain of the Lucy, the vessel on board of which the spirits were laden (and who was Consignee of the same)—of the delivery of said spirits at the port of Cape Coast in Africa ; a declaration of two foreign merchants, residing at said Cape Coast, that the facts, stated in the above-mentioned certificate of the said Charles Collins, are, in their opinion, just and true, and worthy of full faith and credit—and also that no Consul, or other public Agent for the United States, or American merchants, were then residing at that place ; a confirmatory affidavit of the said Master, and of William Collins, Mate of the said Lucy, to the same facts, made before the Governor of the said Port of delivery, and attested under his official seal ; together with a like confirmatory affidavit, to the delivery of the said spirits at said Cape Coast, made by the said Master and Mate, and Isaac Liscomb, a mariner, of the said Lucy, before Joseph Rawson, one of the Justices of the Peace for the County of Bristol, in the State of Rhode-Island.

The proof adduced in discharge of the second bond, are certificates of M. M. Orgill, & James Mill, foreign merchants residing on the Gold Coast of Africa, of Cornell Littlefield, the Captain and Consignee of the Snow Fair Eliza, in which vessel the spirits were exported, all testifying the delivery of the spirits specified in the bond ; and likewise the affidavits of Cornell Littlefield, and William Howe, the Mate, sworn to at Newport, before Christopher Ellery, Esq. confirmatory of the facts stated in that certificate, and further testifying, that there were not residing at the Gold Coast, any Consul or other public Agent for the United States, or American merchants.

As to the certificates produced for the discharge of the first bond, the mistake in this, as in Stanton's case is, that the Captain being Consignee, has

has certified as such, whereas the law requires a certificate from the foreign Vendee. The remarks upon this part of Stanton's case are of immediate application in this; and it is hoped that it was there sufficiently urged, that the forms of certificates to be signed by the foreign Vendee, are not procurable at the Custom-House; a particular form of this certificate is not prescribed by the law, and indeed for so unusual a contingency, as a vessel bound on a foreign voyage, not being addressed to a foreign Consignee, the Custom-House has not thought it necessary to be provided. The Captain, ignorant of the true, and furnished with a false and improper form, must inevitably have erred, even had certificates from the foreign Vendees been attainable. But it has already been sufficiently proved, and every one must be convinced that from the nature of the trade, the illiterate, suspicious, and barbarous character of the natives of Africa, such certificates could not be procured. This explanation is offered on the ground that the construction as to the law of 1799, contended for at the Custom-House is correct, viz. That though the bond was taken on the 5th of June 1799, and consequently under the law of 1791, yet nevertheless it is only to be discharged under the law of 1799, which came into force on the 31st of June, 1799. But that this construction is against law and reason, is submitted without argument upon a reference to the following authorities.

"It is the general rule that no Statute is to have a retrospect beyond the time of its commencement, for the rule and law of Parliament is, that nova constitutio *futuris* formam debet imponere non præteritis." Bac. Ab. vol. 4. p. 637; and see particularly, the exemplification of this rule in the case of Gilmore, and the Executors of Shooter, 2. Mod. 310. and also the general tendency and import of the rule as explained in 8 Mod. 232 Ld. Ray. 1352. 1. Inst. 585.

This point too was determined against the Custom-House construction by the District Court of Rhode-Island, May Term, 1802.

But it is admitted, that even if this bond be dischargeable under the law of March 1791, the proof, tho' rational and substantially correct, is as to form and shape inaccurate. But this again, is imputable to the error of the Custom-House, or rather to the singular accident of a vessel commencing the preparatory operations of her voyage under one law, and being obliged to proceed in her future operations by a *different* law. For though the bond be dated on the 5th of June 1799, the Lucy did not sail until the 10th of August

Auguſt following, when the forms of certificates required by the new law, then in force, were of courſe in ordinary uſe, and were *thoſe actually furniſhed the Captain of the Lucy*, and thus the Captain, labouring under what the law terms an involuntary, and what is certainly an excuſable ignorance, was unable to detect the miſtake or to follow otherwiſe than implicitly the forms he had given him as correct. He was neceſſarily miſled, and hence the difference was occaſioned which ſubſiſts between the certificates required by the law in force when the bond was taken, and thoſe which were actually procured.

The proof produced in diſcharge of the ſecond bond is likewiſe defective in ſome trivial formalities, and in formalities only. The certificates in this caſe are certified by foreign merchants, by the Captain and Conſignee, are confirmed by the Captain and Mate, and every appearance of doubt and difficulty is removed by the additional depoſition of the Captain, made at Newport, the 26th of September, 1803.

In none of theſe caſes has any doubt been inſinuated as to the *good faith* of the exporter; every preſumption, every circumſtance operates to a contrary conviction. If the fair dealing and reſpectable merchants who are intereſted in theſe caſes, are not relieved, they muſt be ſacrificed to a ſuperſtitious adherence to formalities. The queſtions which preſent themſelves in theſe caſes, have no relation to the truth of the fact of bona fide exportation:—They are merely points as trifling as whether a name ſhould be ſigned on the right hand of a paper or the left, whether a certificate ſhould be written in red ink or black. Whatever may be the form, the fact remains the ſame. The facts in all theſe caſes are proved by better evidence, & more abundantly convincing, than even certificates can be, however formal, preciſe and punctilious. If theſe queſtions were conſidered as open to common law proof, the crews of all the veſſels, and numerous other individuals knowing to the facts of the exportation, ſale and conſumption of the merchandize abroad, to all the tranſactions and circumſtances of the voyages, would throng the tribunal where the matter was to be inveſtigated. The queſtion is—Will you, becauſe a fact is proved by *better evidence* than you required, reject the evidence, and act upon a conviction that the fact is not proved? Surely, performing more than was promiſed, is performing as much. A tender of too much does not invalidate a payment; and it can hardly be deemed a failure in a contract to pay in a *purer coin* than our contract or the law demands.

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It cannot be an objection to the fair dealings of the parties that the certificates produced are not correct. If they had meant to have exhibited falſe evidence, it would have been eaſy to have procured it. Fraud is always exact and minute. Falſe papers are always accurate as to forms and dates and ceremonies. The eſſence of the Conditions of theſe bonds is, a fair exportation. If it be only the production of a *certain* ſet of Certificates, it would be a matter of courſe, to thoſe who meant fraud to procure ſurreptitious ſignatures to correct certificates. It has long been remarked by the ſages of the law, that fraud pays an unuſual and over-laboured attention to forms. Forged Wills are never wanting in the ceremonies of execution. Falſe ſhip papers to maſk property are always preciſe and elaborate, ſtiffened with ſeals and formalities, and ſtrengthened by accumulated affidavits. In theſe caſes poſitive proof has been produced on one ſide; no attempt is made to repel it on the other. But what is better, they are ſupported by *circumſtantial* evidence. It is ſaid by one of the moſt enlightened Judges of England, that a preſumption which neceſſarily ariſes from circumſtances, is very often much more convincing, and more ſatisfactory than any other kind of evidence, becauſe it is not within the reach and compaſs of human abilities, to *invent* a train of circumſtances, which ſhall be ſo connected together, as to amount to proof, without affording opportunities of contradicting a great part, if not all of theſe circumſtances.†

Do not the circumſtances of theſe caſes offer violent and neceſſary preſumptions of innocence? Can a reaſon be aſſigned to render it probable that the parties are criminal? Indeed a clandeſtine re-importation of the articles mentioned in the bonds, would have been the commiſſion of fraud without inducement, the perpetration of a crime without motive. To bring back New-England rum from its proper market, where the profits are immenſe and vaſtly exceeding the amount of the drawback, to the country where it was diſtilled, where concealment would be difficult—detection almoſt certain: ſuppoſes ſuch gratuitous wickedneſs, ſuch cauſeleſs criminality, ſuch egregious and unparallelled folly, as render it impoſſible for the mind for a moment to admit the accuſation. That no officer of Government harbours the leaſt doubt, as to the bona fide exportation of the merchandize is apparent from their *conduct* as well as their *declarations*. For by the 89th ſect. of the general collection law, in caſe of the accruing of any penalty, it is made the duty of the officers of Government to com-

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† See the charge of Judge Buller in Doncllan's Caſe.

mence ſuits without delay, and to proſecute to effect. And by the 82d ſect. the penalty for re-landing goods entered for exportation, is the forfeiture of ſuch goods and of the veſſels landing the ſame, and the perſons concerned therein, ſhall ſuffer impriſonment for a term not exceeding ſix months. No ſuit has been commenced, and it is a fair preſumption that the officers of Government have done their duty as expreſsly enjoined by the Statute.—It is clear there has been no criminality—no foundation for a ſuit.

In many of theſe caſes the exporting veſſels were ſold abroad and never returned to the United States; in ſome of them the veſſels were captured: Againſt all of them as has been before ſtated, a ſuſpicion has been entertained that their *return cargo* was a prohibited one. It is hardly probable that a return cargo was procured for nothing, or otherwiſe than by an exchange of the outward cargo. This ſuſpicion on the part of Government, arguing ad hominem (if againſt a Government we may be allowed the expreſſion) diſproves the charge of clandeſtine re-importation. Certainly it is miſerable inconſiſtency to hear from the ſame mouth theſe two contrary charges,—You never exported your outward cargo, but it was privately re-landed in the United States, and therefore we will exact the penalty of our bond. And then aſſuming another tone, you did export your outward cargo, and had in return a cargo prohibited by the laws of the United States, and therefore we will exact the penalty and forfeit of our bond. This as to intent is as cruel as Shylock, but in reaſoning it certainly is not as concluſive. Two oppoſite aſſertions cannot be true.

Two Enquiries muſt now naturally ſuggeſt themſelves to every mind. Why has not the Comptroller of the Treaſury, who has the power, cancelled the bonds? Or if he would not cancel them, and the bonds have been ſued in a Court of Juſtice, why has not juſtice been done? Theſe enquiries it is preſumed, will be ſatisfactorily anſwered. By the very frame and meaning of our CONSTITUTION, a citizen muſt have a right to inveſtigate the propriety, legality, and conſtitutionality of the deciſions of an executive officer. In this inſtance the Comptroller of the Treaſury has great power. He is at the ſame time the guardian of the pecuniary intereſts, and the organ of the merciful and equitable intentions of Government. He is in a certain ſenſe *irreſponſible*. He does not decide as a Judge, and therefore his deciſion is not liable to review. He is not a law officer, but he is empowered in caſes ariſing under revenue law to exerciſe a broad diſcretion. It is difficult to aſcertain the bounds of that *diſcretion* that depends on the will

will or opinion of a ſingle individual, who by no known proceſs of law is made accountable for that opinion or the execiſe of that will. It has been ſaid by a ſplendid authority that even "the diſcretion of a JUDGE is the law of tyrants; it is always unknown; it is different in different men; it is caſual, and depends upon conſtitution, temper, and paſſion. In the beſt it is often times caprice; in the worſt it is every vice, folly and paſſion, to which human nature is liable." †

Meaning nothing in the leaſt degree unpleaſant, unwilling to irritate or to offend, it is not certainly the inclination of the parties to apply theſe terms in any thing like their full extent to Mr. Steele, the late Comptroller of the Treaſury: But theſe remarks are quoted as a proper and pertinent introduction to the conſideration of what has been done in theſe caſes. It is not perhaps his fault as an individual; but the inevitable error of unexaminable decrees and unlimited authority. The Comptroller, according to the 81ſt ſect. of the general collection law, is to be ſatisfied as to the truth and validity of the proofs adduced. He is to draw his knowledge from a ſtatement of all the circumſtances attending the tranſaction made by the Collector. Now it is again confidently aſſerted, that an inſpection of the correſpondence between the Collector and the Comptroller will diſcloſe no circumſtance in the ſmalleſt degree impeaching the truth and validity of the proofs adduced. For ſurely it is not eaſy to miſunderſtand the words "truth and validity." If theſe proofs have been fairly obtained from credible witneſſes, and if they in ſubſtance prove the main fact of *exportation*, they muſt be deemed true and valid. It is reaſſerted that no officer of Government has moſt diſtantly ſuggeſted a doubt as to theſe points.

But it is ſaid that the Comptroller was actuated in his deciſions, by reaſons of ſtate and policy, that he *ſuſpected* the exporting veſſels to have been concerned in a traffic in ſlaves, which is prohibited by the laws of the United States, and that therefore he is juſtified in exacting theſe penalties. Such are the reaſons diſcloſed to the *ſuffering* parties. And it is certain that in other caſes of irregular traffic, of unavoidable accident, of proofs ſubſtantially correct, though informal, the former or the preſent Comptroller have never refuſed in the plain meaning and ſpirit of the law to adminiſter relief. The former Comptroller, (it is not known under what law) demanded of the parties a diſcloſure of their return cargo. In all the caſes of the *ſecurities*, the parties were ignorant of what the return cargo was. And in the

† See Lord Camden's opinion Hindſon and Ux and Al. vs. Kenſey.

the other cafes the parties upon examination of the LAW OF THE LAND found they were not obliged to make fuch a *difclofure.* That law informed them, that fufpicion is not proof, that every man is deemed innocent until proved to be guilty. Though innocent in their own conception, they knew not what ufe might be made of the difclofure of the return cargo: And as citizens of the United States they claimed the benefit of that article of its Conftitution by which they were inftructed that "no man fhall be compelled to bear witnefs againft himfelf." They refifted this demand becaufe it was their duty as citizens fo to do. If they had offended the laws of their country they knew the power and dignity of the country would vindicate public juftice: The Courts were open. If they had been criminal, profecutions under the law prohibiting the traffic in flaves, from one Foreign Country to another Foreign Country, were the legal mode of afcertaining their criminality. That law declares the punifhment of that offence, but the forfeiture of exportation bonds conftitute no part of that punifhment, and at any rate the punifhment could not be inflicted, otherwife, than as the confequence of legal conviction.

Secure in their innocence, they would willingly have encountered a public profecution in the Courts of Juftice. This indirect mode of inflicting punifhment, upon a *private exparte* examination of an executive officer, they knew to be illegal, and an ufurpation. They knew the promptnefs and activity of the officers of Government, in detecting and profecuting violations of law; they knew, that as to the particular law in queftion, the officers of the Cuftom-Houfe had ftanding inftructions, ftimulating their vigilance and enforcing their duty. No profecutions at law had been commenced againft them. The Government in its proper profecuting department, had no probable caufe of accufation; nothing to juftify a proceeding againft them:—And were they to fubmit to an inquifitorial power, as novel as it was oppreffive, as much oppofed to the very *letter* of our Conftitution, as to the benign and liberal fpirit of our common law? To be condemned without trial, or as the Conftitution expreffes it, wi hout due procefs of law; to be accufed and not to be informed of the nature and caufe of the accufation; to have no difclofure of the evidence againft them, nor to be confronted with the witneffes, (if any there were) are proceedings not juftified by the laws, or examples of any FREE Country. To difcover fuch inftances we muft refort to the hiftory of nations, where the people are nothing and their maflers every thing.

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The former Comptroller, may have been betrayed into this mode of procedure, by an over-active zeal in favor of a law, which he thought it eſſential to the intereſts & honor of the country ſhould be ſtrenuouſly ſupported. No diſintereſted perſon cenſures an oppoſition to the Slave Trade. But it cannot be combated by a power beyond the law. In proportion as an offence is deemed atrocious, the law requires fullneſs and exactneſs of proof, and it is an unavoidable concluſion, that as the officers of Government have not followed up their ſuſpicion, by a proſecution, that they have upon further inveſtigation, diſcovered, that there was *no* proof, and have relinquiſhed their ſuſpicion. And if their ſuſpicion be relinquiſhed, they have abandoned the only ground on which relief in theſe caſes has been refuſed.

In conſequence of the deciſion of the Comptroller upon this ſet of caſes, including thoſe of the petitioners and many others, ſuits were inſtituted in the Diſtrict Court of Rhode-Iſland, and four Caſes were tried at Auguſt Term, 1801. Verdicts were inſtantly returned for the defendants. No objection at that time was made to certificates more informal and incorrect, than thoſe already deſcribed, paſſing to the Jury, nor was parol and common law proof prohibited. The plea of performance was fully and ſatisfactorily proved. The Judge on the ground that the fact of exportation was concluſively made out, and no fraud appeared, charged in favor of the defendants. It was reaſonably ſuppoſed that this would be the termination of all theſe proſecutions. But at the ſubſequent Terms in other caſes, not varying in principle, and on like bonds, the Counſel for the defendants were obliged to encounter many extraordinary objections. The Diſtrict Attorney apologized for the facility with which he had permitted the other caſes to be obtained, and intimated that the opinion advanced at the former Court by the defendants Counſel, countenanced by the Judge, and not oppoſed by him ; were according to the inſtructions he had received, illegal and incorrect. That theſe caſes excluded every equitable conſideration and liberal conſtruction, and that he muſt inſiſt rigidly upon the *Statute* evidence, and that the certificates to paſs to the Jury muſt in every point, conform to the Statute : That common law, and parol proof were inadmiſſible; and furthermore, that the defendants had *no right whatever to a trial in a Court of law, for that the deciſion of the Comptroller was final and concluſive.* He ſtated that the Comptroller, Mr. Steele, conceived that the conduct of the Court in the former caſes was INVASIVE of the powers and prerogatives of

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his department, and a letter to that purpose was produced, and a copy thereof may be now seen at the Comptroller's office. This last point was pertinaciously urged. In one of the cases, the defendant, when called upon for trial, alledged and proved, that his certificates were delivered to the Custom-House officer, and that upon application he had refused to re-deliver them. The Collector informed the Court, that he had detained the papers in question in consequence of instructions from the Comptroller, and that the Comptroller held the certificates in other cases, which he had transmitted him. And it was argued, that the Comptroller had a *right* to detain them, for that his decision being final, the evidence produced must rest with him; the COURT that had decided so that the grounds of his decision might appear. And it was in Terms contended that the District Court had nothing to do, but to issue EXECUTION on the Comptroller's decree.

Without recriminating the charge of invasion of the powers of the Judiciary Department; without endeavoring to expose the odious consequences of executive interference in judicial concerns, or deploring with the citizen, his precarious and miserable condition, if he could be thus, contrary to the Constitution, deprived of his right of TRIAL BY JURY, we shall only observe that the Comptroller misconceived the limits of his authority. This novel, monstrous, and indeed impracticable doctrine, was without hesitation over-ruled by the Court. The former Comptroller having resigned his office, without inventing any mode, by which the money could be obtained on a litigated bond, other than by a suit in a law Court, the Courts of law have ventured, notwithstanding his opinion, to sustain these suits, and have subjected them as to pleading and process to their ordinary rules and principles.

As the trials proceeded, the defendant's Counsel again offered parol, and common law proof, in support of their plea of performance. They stated that it was obvious from the perusal of the 81st sect. of the general collection law that the proof by *certificates*, never could have been intended for a *Court of common law*, for *that* proof was to be produced for the purpose of having the bond *discharged* or *cancelled*, and no Court of common law was invested with that power. For a Court of law determines upon issues of law or fact presented to them, and no issue at common law either of law or fact can include that consequence. That proof was to be referred in the first instance to the Collector, who, if the proof conformed to the Statute, was obliged to discharge the bond; if this was not, and could not be procured,

cured, the case was to be referred to the *Comptroller*, an officer empowered to remit the claims of the United States, and to extend a discretionary indulgence according to the nature and circumstances of the case. They contended that as this proof was procurable for a purpose that Courts of law could not accomplish, and referable to executive officers only, for purposes exclusively within the sphere and scope of *their* authority; that Courts of law would proceed, as to the proof of this plea, in these, as in other cases, and would demand according to the maxim of the common law the best evidence of which the nature of the case would admit. *That* evidence they now tendered, consisting of witnesses on the stand, and depositions taken according to law. The defendants were not contending in a Court of Chancery for a bond to be delivered up to be cancelled, or discharged, but were trying in a Court of common law the plea of performance, a plea perfectly familiar to these Courts, and the proof of which was settled by ancient decisions and indisputable principles.

They likewise offered the certificates, contending that if mistaken in arguments which they thought authorized common law proof; that if the certificates, which it appeared by the Statutes were referable only to an executive officer, were likewise referable to a Court of law; that they were to be produced before the *one* tribunal, as before the *other*, with all the attendant equities and indulgencies accorded by the Statute, and that the Jury were likewise entitled to consider the TRUTH and VALIDITY of the proofs adduced, in cases where in consequence of loss by sea, or by capture, or other unavoidable accident, or when from the *nature of the trade* the strict Statute proof could not be procured; and that if satisfied that the proofs were true and valid, their verdict ought to be in favor of the defendants. That any other construction would lead to the most absurd conclusions, and be fraught with the most alarming consequences; and would absolutely place the whole amount of the drawbacks of the United States, dependant upon the irreversible decree of an irresponsible officer. The Government would always be its own judge, in its own case; and the wanton caprice or honest error of a single individual, might doom hundreds of individuals to ruin. Let us, (as it was said) suppose that these were cases in which the exporting vessels had been captured; and that in consequence no certificates being procurable, none were produced within the two years. And that altho' the capture was notorious and provable by the best evidence; the decree of condemnation of the prize Court, and by the crew, and numerous disinterested and credible witnesses;—Yet, nevertheless, the Comptroller having (as it

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was on the other ſide contended) the ſole power; from pretended reaſons of policy, or real reaſons of perſonal antipathy to the ſufferers, ſhould refuſe to adminiſter relief. Would any one contend that in a Court of law, this defence, ariſing from the fact of capture, and the conſequent impoſſibility of procuring certificates, could not be exhibited—and if proved, be available? If this were ſo, Courts of law would be worſe than uſeleſs. It would be converting them into engines of the oppreſſion of others. And yet the caſe at bar did not differ; for proof was offered to ſhew that from the "nature of the trade" it was impracticable to procure other certificates, than thoſe produced. And *this* apology for defective proof, was by the Statute placed on the ſame foot with that of "capture." The defendant's Counſel likewiſe urged that by the 111th ſect. of the ſame law; "that in caſes where the forms of official documents were ſubſtantially complied with, & obſerved according to the true *ſpirit*, meaning, and intent thereof, no penalty or forfeiture ſhall be incurred by a deviation therefrom." That this clauſe extended to certificates as well as to other *documents*; that it was general in its language and in its proviſions, and extended as well to the Courts of law as to offi ers of the revenue. And as it was *admitted*, that the certificates and other proofs produced were ſubſtantially correct, according to the true ſpirit of the law; they contended that they ought on that ground and by force of that ſection to paſs to the Jury as ſatisfactory and legal proof. They explained to the Court, that if it be a true propoſition, that certificates, becauſe informal, could not paſs to the jury; that it was effectually, though indirectly, eſtabliſhing the doctrine contended for by Mr. Steele, and that the Court would in the one caſe, as in the other, become merely a chamber to regiſter, or a ſubordinate organ to execute his decrees.

For *correct* certificates never could make their appearance in a Court of law, becauſe if correct, the bonds muſt be immediately diſcharged by the Collector, and therefore no ſuit could be brought; and if they were rejected totally as evidence, becauſe incorrect, and no other evidence admitted, then, the unavoidable conſequence muſt be, as the defendant was diſarmed of proof, judgment and execution.

They argued that it had been for the laſt century at leaſt, the conſtant effort of the Courts of common law, to ameliorate its ſeverities and accommodate itſelf to the exigencies of ſociety, the growth of commerce, and the improvement and refinement of the times; That in commercial concerns the rules of EVIDENCE, were liberal, and enlarged; and the Court leant againſt

againſt nice exceptions to its admiſſibility. Their great object was to be poſſeſſed of the truth of the caſe. They did not confine themſelves to one particular deſcription of proof; they did not exclude the light, let it beam from what quarter it would. Evidence that the narrow rigor, and inflexible ſeverity of the antient juriſprudence would have excluded, was now admitted; and admitted from a *neceſſity* to accommodate human affairs, and to prevent *that* which Courts are by every poſſible means inſtituted to prevent, a FAILURE of JUSTICE. That neceſſity too, was not confined to the ſtrict limits of phyſical cauſes, but took in a moral, and even preſumed, and argumentative neceſſity. ‡

It was contended that at leaſt the conſtruction of this Statute was doubtful and unſettled. For who could ſay why the ſett of proofs by which the Collector was to diſcharge the bond, ſhould be preſented to the Jury; and that proofs, imperfect from neceſſity, to be preſented to the Comptroller, ſhould be excluded; when there was nothing in the ſtatute mandatory on the courts, to receive, or adjudge by, either of theſe ſpecies of proof. And as eſpecially, (as has been before explained) the firſt from the courſe and nature of things, never could be adduced in Court, there would be nominally *admitted*, what in fact there never could be an opportunity, either to admit or exclude: And there would be *excluded* the only proof that could in theſe caſes be preſented. Where the law is known and clear, the Judges muſt determine as the law is, without regard to the inequitableneſs or inconvenience; but where the law is doubtful and not clear, the Judges ought to interpret the law to be, as is moſt conſonant to equity, and what is leaſt inconvenient. †

The Court were fortunately bound down by no precedents. They might ſay, as Lord Mansfield once ſaid with exultation; "There are no precedents which ſtand in the way of our determining liberally, equitably, and according to the true intention of the parties." ‖ The Court were not obliged to go to the length of ſaying as Lord Mansfield had ſaid in another caſe "we don't *now* ſet here to take our rules of evidence from Siderfin & Keble." § For no precedents ſuited to the ſubject matter, could be found in the Engliſh Books; certainly none againſt the defendant were produced or referred to. The ſubject was a new one and at large; unfettered by de-

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‡ "Antiqua juriſprudentia aſpera quidem illa tenebricoſa et triſtis non tam in equitate quam in verborum ſuperſtitione fundata." Gravina p. 86. See the whole caſe of Ormichund vs. Baker 1. Ath. vol. 1. p. 37. Burr. vol. p. 301. and 414. Abraham vs. Buns 2254. † Lord Vaughn, fol. 37, 38.

‖ Burrow, 1147 Zouch, ex demiſs Woolſton vs. Woolſton and Al.

§ Lowe vs. Jalliffe 1 Blacket. Rep. 366.

ciſions, and open to the liberal determinations of equity and good ſenſe. The Court would then from the actual exiſting caſe, and from circumſtances of the perſons, and of the buſineſs ; under the guidance of an incorrupt judgment of the mind, which is called an equitable diſcretion ; determine, what proof was to be admitted as rational, or rejected as falſe. The daily negociations and property of merchants, ſays Lord Mansfield, ought not to depend upon ſubtilties and niceties, but upon rules eaſily learned, and eaſily retained becauſe they are the dictates of common ſenſe drawn from the truth of the caſe.

Perhaps it may occaſion ſurpriſe, to the moſt of thoſe who read theſe remarks that this argument ſpread as it was in the expanſion of detail, and ſortified by reference to numerous deciſions, which cannot without tediouſneſs be repeated here ; ſhould not have been ſuccefsful. But it was determined by the Court, that, " parol proof, & ſuch as would be allowed of at common law, could not be admitted ; but that the evidence muſt conform to the Statutes. That if the evidence does not conform to the Statutes, the Comptroller has the excluſive power of diſcharging the bonds: The Court and Jury have not a concurrent power, and his deciſion in ſuch caſe is final." It would be preſumption to ſay a ſyllable againſt this deciſion, *eſpecially as the arguments and reaſons in ſupport of it have never been diſcloſed.* The notes of Counſel have been conſulted, and their memories taxed ; but they furniſh a reference to no authorities, and give only the opinion, *as it was delivered in Court.* And that it is correctly ſtated, will be ſeen by a reference to the letter of his Honor Judge Barnes, to William Hunter, Eſquire, of Counſel for the defendants. †

Stripped of all proof, the defendants would have now been without reſource, had not their Counſel requeſted, as they had a right to do, that the damages might be aſſeſſed by a jury. They contended that upon a penal bond for the performance of covenants, the damage accruing to the party complaining, was a matter examinable, not fixed neceſſarily by the bond ; that in theſe caſes there could be no ſtandard rule ; that if the United States would even ſuggeſt that the goods were not landed bona fide abroad, they were willing the Jury ſhould aſſeſs exemplary damages, and go to the full amount they could go, viz. the amount of the penalty. But if on the other hand, no ſuggeſtion of fraud was even thrown out ; and it was apparent from the very management of theſe caſes, and the confeſſion or acquieſence of

† See Appendix No. 9.

of the attending officers of Government, that the United States had not been defrauded, they ought to recover only *nominal* damages, by which they would be exempted from coſts, and at the ſame time reſpect to the revenue laws would be enforced by their obtainment of a verdict. They ſtated that the Jury had the diſcretionary power of giving ſuch damages as they thought proper; that the Court could neither mitigate or increaſe the damages, nor could dictate to them as a matter of law any inflexible or invariable rule on this ſubject. ‡ It was argued, that, had we plead *payment*, we muſt have plead payment of the whole ſum ; § therefore that muſt be the *legal debt* or amount of damages, and if in equity, according to the clauſe in the Judicial Act, this amount of debt or damages, is to be reduced, it is to be reduced by the Jury in their *diſcretion* ; and there is no rule of law to bind the diſcretion of a Jury : It is a ſoleciſm in law language. The aſſeſſment of damages is as much their peculiar province, as weighing the credibility of witneſſes ; and the Court are as much excluded from the one as the other. In antient times they would not have been ſubject to an attaint ; or in modern times is it uſual to grant a new trial for ſmallneſs of damages. By the Court's yielding to the requeſt of the parties, it was decided that the ſum was "uncertain ;" and why were the Jury reſorted to at all, but to reduce this uncertainty into certainty ? This point was urged at length to the Jury, againſt the apparent inclination of the Court, with that firmneſs and intrepidity, which it is hoped becomes Counſel in a free country who are convinced of the merits of their clients caſe. The Court however decided, that the Jury are bound by law in aſſeſſing damages, to find the amount of the drawback paid to the exporter, with intereſt from the time it was paid to the time of returning the verdict. The Juries, however, reſiſted this doctrine of the Court, and in all the caſes have returned ſmall damages. The Judge has granted new trials, but ſtill the difficulty is great, to obtain from Juries, verdicts ſo abhorrent to their feelings, and to common ſenſe. Finding that the officers of Government did not relax in their proſecution of theſe caſes : The defendants at November Term, 1802, applied to the Courts for continuances, grounded on the detention of their documents at the public offices ; and ſuggeſting their intentions of an application to the mercy and equity of the Government. The Court would only continue theſe caſes for *judgment* ; and as the price and condition of theſe continuances, obliged the parties to forego their right to have the damages aſſeſſed by a Jury. By

‡ See Bacon's Ab. vol. 2. pages 4, and 10. 2 Rol. Rep. 21. and 22. 2 Jones 138.
§ See Black. Rep. vol. 1. p. 388.

By any thing here ſaid, no complaint againſt the Court, is moſt diſtantly intended. The Judge determined according to what he conceived to be the principles of law. But he was by no means inſenſible to the hardſhip of the caſes. On the bench, and in his letter to the defendants Counſel above referred to, he admitted the abſence of all fraud in theſe caſes. It was the misfortune of the parties, that from the ignorance of their Captains, the nature of the trade, and other perhaps unavoidable cauſes, that the correct Statute proof could not be procured; uſing the words of Lord Mansfield, he ſaid, he was ſorry, as a Judge in a Court of Juſtice could be ſaid to be ſorry, at the ſituation of the defendants, but that motives of commiſeration ought not to influence *him*. Durum, valde durum ſed ſic lex eſt. He ſuggeſted that the mode of relief contemplated by the defendants was the proper one. Petitions were accordingly in the courſe of the enſuing winter preſented to the Honorable Gabriel Duvall, the preſent Comptroller of the Treaſury, who had an opportunity to hear from Aſher Robbins, Eſq. aſſiſtant Counſel to the United States, and from the Counſel of the defendants, all the circumſtances attending theſe caſes. There was no diverſity in their ſtatements. And after examination he was pleaſed to expreſs an opinion favorable to the Petitioners: But was unable to grant relief, as he ſaid theſe caſes had been decided againſt the Petitioners by his predeceſſor in office, and it was a rule of the office, from which it would be greatly inconvenient to depart, not to reviſe any former deciſions. He, however, recommended the caſes of the Petitioners, by a note dated the 14th of Feb. 1803, as proper ſubjects for legiſlative deliberation.

This mode of redreſs, ſuggeſted from ſuch reſpectable authority, as expedient, it was not in the power of the Petitioners laſt winter to purſue. It was apprehended that the preſſure of more important buſineſs, would prevent ſuch a diſcuſſion of theſe queſtions, in the almoſt expired term of the ſeſſion, as would conduce to a proper determination. Executions, having, by the favorable interpoſition of the Comptroller, been ſuſpended, to afford the parties an opportunity for procuring relief in theſe hard caſes from the *wiſdom* and equity of Congreſs; petitions are accordingly now preſented, and preſented by parties to whom nothing can be more afflicting, than to be involved in a controverſy with the United States; to whoſe Conſtitution and Government, they are warmly and excluſively devoted, and whoſe rights and intereſts they would diſdain to violate or defraud.

APPENDIX.

APPENDIX.

(No. 1.)

WE, John Stanton, Maſter, and Thomas White, Mate, of the Sloop Julia, of Rhode-Iſland, do ſolemnly ſwear, that there have been landed from on board the ſaid Sloop, and left in Africa, one hundred and three hogſheads, twenty ſix tierces and five barrels, containing eleven thouſand, ſix hundred and fifty four gallons of firſt proof New-England Rum, of various marks and numbers, which ſaid Rum was ſhipped on board the ſaid Sloop, by the ſaid John Stanton, of Rhode-Iſland, Mariner and Merchant.

And we further ſwear, that there is no American Conſul, or Merchant, reſiding at preſent at any of the Ports of delivery.

JOHN STANTON,
THOMAS WHITE.

Sworn before me at Cape Coaſt Caſtle, this 4th day of February, 1800.
In preſence of J. GORDON, *Gov.*
H. B. HERBERT, *Sec'ry.*

I, John Stanton, Maſter of the Sloop Julia, of Rhode-Iſland, do ſolemnly ſwear, that there have been delivered from on board the ſaid Sloop, and left in Africa,

IN.110 111.113.114.116.117—6 quarter caſks of Sherry Wine,
[5 caſes Claret Wine] containing one hundred ninety two gallons & one half gallon.

JOHN STANTON.

Sworn before me, at Cape Coaſt Caſtle, this 4th day of February, 1800.
In preſence of J. GORDON, *Gov.*
H. B. HERBERT, *Sec'ry.*

Port of Newport.

WE, John Stanton, Maſter, and Thomas White, Mate, of the Sloop Juliet, of Newport, lately arrived at the port of Newport, from the Coaſt of Africa and Havana, do ſolemnly ſwear, that the goods or merchandize enumerated and deſcribed in the foregoing certificates, dated the fourth day of February laſt, & ſigned by the ſaid Maſter and Mate, and ſworn to before I. Gordon, Gov. in preſence of H. B. Herbert, Sec'ry, at Cape Coaſt Caſtle in Africa, were actually landed from on board ſaid Sloop, & left at ſaid Cape Coaſt Caſtle, within the time ſpecified in ſaid certificates. And

And we further ſwear that there were not reſiding at ſaid Cape Coaſt Caſtle, any Conſul, or other public Agent, for the United States of America, or American merchants, or Foreign merchants, other than thoſe who have ſigned the certificates aforeſaid.

JOHN STANTON,
THOMAS WHITE.

Sworn at Newport, Rhode-Iſland, United States, this fifteenth day of July, one thouſand eight hundred,
Before me, CHRISTOPHER ELLERY, *Juſtice Peace.*

CONSIGNEE's CERTIFICATE.

I, John Stanton, of the town of Newport, Mariner, do hereby Certify, that the Goods or Merchandize herein-after deſcribed, have been landed at Cape Coaſt Caſtle, between the twenty third day of December, 1799, and ſixteenth day of January, 1800, from on board the Sloop Juliet of Newport, whereof John Stanton is at preſent Maſter, viz.

MARKS.	NUMBERS.	PACKAGES & CONTENTS.
		One hundred and one hogſheads and twenty ſix tierces, containing eleven thouſand two hundred eighteen gallons of Rum, diſtilled from molaſſes, of the firſt proof.
		One hogſhead and two barrels containing one hundred fifty eight gallons of Rum, diſtilled from Foreign materials, of the firſt proof.
I N	110.111.113.114.116.117.	Six quarter caſks Sherry Wine, containing one hundred ninety two and one half gallons.

which according to the Bills of Lading for the ſame, were ſhipped on board the Sloop Juliet at the Port of Newport in the United States of America, on

on or about the twenty firſt day of October, 1799, and conſigned to me by myſelf and Thomas White.

Given under my Hand, at the Port of Newport, this twenty ſecond day of January, 1801.

JOHN STANTON.

Oath or Affirmation of the Maſter and Mate.

PORT OF NEWPORT.

WE, John Stanton, Maſter, and Thomas White, Mate of the Sloop Juliet of Newport, lately arrived from the Coaſt of Africa, do ſolemnly ſwear, that the Goods or Merchandize enumerated and deſcribed in the preceding Certificate, dated the twenty ſecond day of January, 1801, and ſigned by John Stanton of the town of Newport, were actually delivered at the Coaſt of Africa from on board the ſaid Sloop within the time ſpecified in the ſaid Certificate.

JOHN STANTON,
THOMAS WHITE.

Sworn to, at the Port of Newport, before me, this twenty-fourth day of January, 1801. CHRISTOPHER ELLERY, *Juſtice Peace.*

(No. 2.)

I, John Bours, junior, of Newport, in the county of Newport, and State of Rhode-Iſland and Providence Plantations, being of lawful age, teſtify, and ſay, that I was knowing to the Voyage of Captain John Stanton, to Africa, in the year 1799, and that his cargo conſiſted of Rum, Wine, Tobacco, &c. and was landed and ſold in Africa, and was not reimported here: That upon his arrival he preſented his certificates to the Cuſtom-Houſe, being the uſual ones procured from Africa, and which had not been heretofore refuſed, viz. that ſigned by Governor Gordon, and atteſted by H. B. Herbert, his Secretary: That upon its being refuſed, there being yet time enough before the expiration of the two years to procure others, the ſaid Stanton, through my advice and agency, procured from the Cuſtom-Houſe other certificates, being the uſual printed forms, one of which was filled up by a Clerk in the office, namely, Thomas Peckham, jun. and he was informed, that if that certificate was returned in ſeaſon, it would be ſufficient, and his bond would be diſcharged. Whereupon, the ſaid Certificate which had been filled up was ſent to Africa and returned, when he preſumed his bond of courſe, was cancelled; but this deponent underſtands the ſaid Stanton has been ſued on the part of the United States, for what

reaſon

reaſon he (the deponent) knows not, as he has often heard the Cuſtom-Houſe officers ſay that they had no doubt that the goods had been fairly exported; and that the Document exhibited by Captain Stanton, ſworn to before Governor Gordon, and atteſted by H. B. Herbert, were true, fair, and valid: But that the certificates were not in point of form correct; and that it was therefore their duty to repreſent the matter to head quarters, as they termed it.

JOHN BOURS, jun.

Sworn to before me, PAUL M. MUMFORD, *Public Notary.*

UNITED STATES OF AMERICA.

State of Rhode-Iſland and Providence Plantations.

NEWPORT, TO WIT:

BY this Public Inſtrument be it known unto all whom the ſame doth or may concern, that I, Paul M. Mumford, a Public Notary for the county of Newport, in the State of Rhode-Iſland and Providence Plantations, in the United States of America, duly commiſſioned and ſworn, reſiding in Newport, in ſaid county of Newport, do hereby certify, that on the day of the date hereof, at ſaid Newport, before me perſonally appeared John Bours, jun. of ſaid Newport, the perſon named in the preceding affidavit and ſubſcribed the ſame, and being duly ſworn according to law, depoſed to the truth of the matters therein mentioned and referred to, as is therein ſet forth: And I do further certify that I am acquainted with the ſaid John Bours, jun. and have known him for a conſiderable time, and fully believe entire faith and credit are due to his ſaid depoſition.

Whereof an atteſtation being required, I have granted this under my Hand and Seal of Office.

Done at ſaid Newport, this fifteenth day of September, in the year of our Lord, one thouſand eight hundred and three.

PAUL M. MUMFORD, *Public Notary.*

(No. 3.)

UNITED STATES OF AMERICA.

State of Rhode-Iſland and Providence Plantations.

NEWPORT, *ſs.*

BY this Public Inſtrument be it known to all whom the ſame doth or may concern, that I, Paul M. Mumford, a Public Notary for the county of Newport, in the State of Rhode-Iſland and Providence Plantations, in the United States of America, duly commiſſioned and ſworn, reſiding in Newport, in the county of Newport, do hereby certify that on the day of the date

date hereof, at faid Newport, before me perfonally appeared Martin Benfon, of faid Newport, the perfon named in the affidavit on the following page written, and fubfcribed the fame; and being duly cautioned, made oath to the truth of the matters therein contained. And I do further certify, that the faid Martin Benfon is well konwn to me, and that from the knowledge I have of his character, I fully believe entire faith and credit are due to his faid affidavits.

In teftimony whereof, I have hereunto fet my Hand and Seal of Office, at faid Newport, this fifteenth day of September, in the yeva one thoufand eight hundred and three.

PAUL M. MUMFORD, *Public Notary.*

State of Rhode-Ifland and Providence Plantations.

NEWPORT, TO WIT:

MARTIN BENSON, of Newport, in the county of Newport, and State of Rhode-Ifland and Providence Plantations, Merchant, (being of lawful age) teftifieth and maketh oath according to law, that the certificate under the hand and feal of I. Gordon, Governor of Cape Coaft Caftle, and atteft-ed by H B. Herbert, his Secretary, was the ufual form there granted: That it is the perquifite of the Secretary to fill up fuch certificates: That he has been acquainted with Africa, and the African trade between thirty and forty years—twenty of which he has been a refident in Africa, and a confiderable part of the time at Cape Coaft Caftle: That it is altogether impoffible to procure from negroes certificates of articles fold them—a black man will not put his name to a paper he cannot read, and does not underftand: That with Governor Gordon, and H. B. Herbert, he (the deponent) was perfonally acquainted; and that they were Gentleman of honor, integrity, and intelligence, to whofe official acts, and public doings full faith and credit ought to be given MARTIN BENSON.

Sworn before me, PAUL M. MUMFORD, *Public Notary.*

I, CONSTANT TABER, of Newport, in the county of Newport, and State of Rhode-Ifland and Providence Plantations, do folemnly fwear, that I had no intereft in the Schooner Betfey, Daniel Whitney, Maller, and part owner with Daniel Marcy, or in her voyage—and that I have never been concerned in the flave trade to Africa, and that I know not abfolutely what her return cargo was. I wrote to my correfpondent in Boftan, requiring him to inform me if Daniel Whitney left any property, or if Marcy was in

Boſton, and had any property. He wrote me he could not learn that Whitney left any property—and that Marcy had been gone from Boſton ſince January laſt—that if he ſhould arrive there he would let me know immediately, or if any property of theirs could be found; but as yet no property has been found of theirs; nor has Marcy returned.

CONSTANT TABER.

STATE OF RHODE ISLAND, &c.

NEWPORT, *ſs.* *County of Newport, October 21ſt,* 1802.

Then perſonally appeared Conſtant Taber, above named, and having ſubſcribed the preceding declaration with his own hand, made ſolemn oath that the facts contained in the ſame were the truth, and nothing but the truth. *Before* PAUL M. MUMFORD, *Juſtice Peace.*

(No. 6.)

WILLIAM GARDNER, of Newport, in the State of Rhode-Iſland and Providence Plantations, on oath declares, that he had no concern whatever in the veſſels, and voyages, in which the bonds were given, upon which the ſuits have been brought againſt him as mentioned in the annexed ſtatement, certified by Edmund T. Ellery, Clerk of the Diſtrict Court for Rhode-Iſland Diſtrict:—That he ſigned ſaid bonds merely as ſurety—Daniel Marcy the principal in one of them, is not to be found or heard of, and generally believed to be inſolvent—that John Stanton, the principal, in the others of thoſe bonds, is dead, and though, perhaps, his eſtate is not totally inſolvent, yet it is extremely doubtful whether any thing could be obtaind from his widow, and her orphan children—and that it is probable he muſt finally be obliged to pay the large ſum demanded by the United States in this caſe—that the evidence to ſubſtantiate the due landing of the Rum, &c. in this caſe, was in all its formal requiſites exact—the form of the certificates being furniſhed, and filled up at the Cuſtom Houſe here, before ſailing, except that the Captain by miſtake, ſigned the page the Conſignee ſhould have done.

WILLIAM GARDNER.

STATE OF RHODE-ISLAND, &c.

NEWPORT, *ſs.* *County of Newport, October 22d,* 1802.

Then perſonally appeared William Gardner, abovenamed, and having ſubſcribed the foregoing Depoſition with his own hand, made ſolemn oath, that it contained the truth, and nothing but the truth

Before me, PAUL M. MUMFORD, *Juſtice Peace*

I, THOMAS PECKHAM, jun. of Newport, in the State of Rhode-Iſland, &c. teſtify that I was a Clerk in the Cuſtom-Houſe, in Newport, from Auguſt 1799, to February 1803; that I have ſeen a form of a certificate, oath and verification bonds, and which certificate is entitled "Conſignee's Certificate," with which Capt. J. Stanton was furniſhed at the Cuſtom-Houſe; that the blanks in ſaid certificate, oath, &c. were filled up by me; and that no forms of certificates, &c. were furniſhed at the Cuſtom-Houſe, to my knowledge, except ſuch as were ſimilar to the one furniſhed to Captain Stanton. THOMAS PECKHAM, jun.

NEWPORT, *ſs.* At Newport, on the 30th day of September, A.D. 1803, appeared Thomas Peckham, jun. and ſwore to the truth of the above writing by him ſubſcribed, before me

THOMAS PECKHAM, *Juſtice of the Peace.*

CORNELL LITTLEFIELD, of Newport, in the county of Newport, and State of Rhode Iſland and Providence Plantations (Mariner) being of lawful age, teſtifyeth and maketh oath, that he was Captain and Conſignee of the Snow *Fair Eliza*, of Briſtol, in ſaid State of Rhode-Iſland, owned by *Charles D'Wolf* and *Jeremiah Ingraham*, of ſaid Briſtol, in the year 1799 & 1801: That the cargo conſiſted of one hundred ſeventy three hogſheads, two tierces, and ſix barrels of New-England Rum, which was landed, ſold, and remained on the Gold Coaſt of Africa: That Meſſrs. Orgel and Mills, Merchants there, were the purchaſers of the cargo: That they as well as himſelf (the deponent) were ignorant in what manner they ought to certify this fact: And that, therefore both himſelf (the deponent) and William Howe, his Mate, ſigned *all* the forms of certificates, and atteſted to them before Orgel and Mills, preſuming that would be beſt; and not apprehending any difficulty, as the rum was conſumed abroad, and never reimported into the United States. CORNELL LITTLEFIELD.

NEWPORT, *to wit:* *State of Rhode-Iſland, &c.*

On this firſt day of October, in the year one thouſand eight hundred and three, at ſaid Newport, before me the ſubſcriber, a Public Notary for ſaid county, perſonally appeared Cornell Littlefield, the perſon named in the foregoing depoſition, and ſubſcribed the ſame in my preſence; and being by me duly ſworn according to law, made ſolemn oath to the truth of the matters therein contained. In teſtimony whereof, I have hereunto ſubſcribed my name, on the day and year, and at the place before mentioned,

PAUL M. MUMFORD, *Public Notary.*

(No. 9.) *Providence, Dec. 20th, 1802.*

SIR,

IN the courſe of the trials in the Diſtrict Court on exportation bonds, the following points have been decided:

1ſt. That the Defts. have a right to plead as in other caſes.

2d. That if the Defts. plead performance of the condition, on which iſſue is joined, parol proof, and ſuch as would be allowed of at common law, cannot be admitted, but the evidence muſt conform to the Statutes.

3d. That if the evidence does conform to the Statutes, the jury ought to find for the Defts. the deciſion of the Comptroller notwithſtanding—but if the evidence does not conform to the Statutes, the Comptroller has the excluſive power of diſcharging the bond. The Court and Jury have not a concurrent power with him, and his deciſion in ſuch caſe is final.

4th. That the Jury are bound by law in aſſeſſing the damages, to find the amount of the drawback paid to the exporter, with intereſt from the time it was paid to the time of returning the verdict.

The certificates produced ſince Auguſt Term, 1801, were rejected on the ground that they did not conform to the Statutes. The buſineſs was generally done by the Maſters of the veſſels on the Coaſt of Africa, where there was no Conſignee, no American Conſul, no American Merchant, and very few foreign Merchants, and where, from the nature of the trade, it was perhaps impracticable to obtain the certificates of the Vendees. However probable therefore it might be, from the circumſtances which appeared, that the property was in fact landed abroad, ſtill as the evidence did not conform to the Statutes, it was conceived that the Comptroller alone had power to diſcharge the bonds.

I am your Obedient Servant,

DAVID LEONARD BARNES.

WM. HUNTER, Eſq.

☞ IT was intended to have preſented all the various documents, accompanying theſe caſes, in this Appendix; but it was found that it would be ſwelled to an inconvenient ſize. The candid inquirer will therefore be pleaſed to ſee and conſult them in manuſcript. Duplicates of many of them are at the Comptroller's office, and all of them are in the hands of the Hon. Chriſtopher Ellery, Eſq. or of the other Repreſentatives in Congreſs from the State of Rhode-Iſland, to be by them preſented to the proper Committees that may be appointed for the inveſtigation of this ſubject.